JD–72–21
Kalamazoo, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ASCENSION BORGESS HOSPITAL,
Respondent

and **Case 07-CA-273489**

MICHIGAN NURSES ASSOCIATION,
Charging Party

Matthew Ritzman Esq.,
for the General Counsel.
Richard Yorke, Esq. and
Julia Smith-Heck, Esq.,
for the Charging Party.
Jonathon Rabin, Esq.,
for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. I heard this case on November 2, 2021, via Zoom for Government videoconference. After the parties rested, I heard oral argument on November 17, 2021, and issued a bench decision on November 19, 2021, pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In the complaint, the General Counsel alleged that Ascension Borgess Hospital (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to provide the following information to the Michigan Nurses Association (Charging Party): the CPI techniques and Ron Gipson's interpretation of those techniques referenced by Respondent in an employee termination notice and related correspondence sent by Respondent to the Charging Party.

For the reasons stated by me on the record, I found that the General Counsel established that Respondent violated Section 8(a)(5) and (1) of the Act as alleged. In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of, and attach hereto as

"Appendix A," the portion of the transcript containing this decision.[1] I further attach a notice posting consistent with this decision hereto as "Appendix B."

CONCLUSIONS OF LAW

1. Respondent, Ascension Borgess Hospital, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a healthcare institution within the meaning of Section 2(14) of the National Labor Relations Act (Act).

2. Michigan Nurses Association (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to provide the Union with information it requested on February 11, 2021, that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

4. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

Respondent, Ascension Borgess Hospital, Kalamazoo, Michigan, and its officers, agents, successors, and assigns, shall

1. Cease and desist from

[1] The bench decision appears in uncorrected form at pp. 204 through 233 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as "Appendix A" to this certification.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Refusing to bargain with the Union, Michigan Nurses Association, by failing and refusing to furnish it with requested information that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees in the following appropriate bargaining unit:

All Registered Professional Nurses employed by the Medical Center and classified as full-time, regular part-time, and part-time employees (part-time employees are regularly scheduled to work sixteen (16) hours or more per week) excluding Directors, Assistant Directors, Supervisors, Clinical Nurse Specialist, Nurse Educators, Clinical Managers, Nurse Practitioners, Infection Control Specialist, Stomal Therapist, Employee Health Outcomes Specialist, member of the Order of the Sisters of St. Joseph, PRN Nurses, and other employees. Graduate nurses and nurses in the Nurse Residency Program shall be included in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union with the following information it requested on February 11, 2021: the CPI techniques and Ron Gipson's interpretation of those techniques referenced by Respondent in an employee termination notice and related correspondence sent by Respondent to the Charging Party. If any of this information does not exist, Respondent shall inform the Union that no such documents exist. If the documents containing the interpretations of Ron Gipson contain information or impressions beyond Gipson's interpretations, such information may be redacted.

(b) Within 14 days after service by the Region, post at its facility in Kalamazoo, Michigan, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent, and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2021.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 3, 2021

Melissa M. Olivero
Administrative Law Judge

APPENDIX A

JUDGE OLIVERO: Good morning, everyone. We are here today, using Zoom Government Videoconferencing, for the issuance of my bench decision in the matter of Ascension Borgess Hospital and Michigan Nurses Association, Case 07-CA-273489. Present today for the parties are Mr. Ritzman for the General Counsel, Mr. Yorke for the Charging Party, and Mr. Rabin for Respondent. On Wednesday, November 17, I entertained oral arguments telephonically and today, after considering the testimony, evidence, and the oral arguments presented in the case, I am prepared to render a decision. This decision is rendered pursuant to Sections 102.35(a)(10) and 102.45(a) of the Board's Rules and Regulations.

The charge in this case was filed on March 2, 2021, by the Michigan Nurses Association (which I will refer to as the Union or the Charging Party). The complaint was issued on July 27, 2021 against Respondent, Ascension Borgess Hospital.

The complaint alleges at paragraph 10 that since about February 11, 2021, the Charging Party has requested in writing that Respondent furnish the following information: The CPI techniques and Ron Gipson's interpretation of those techniques referenced by Respondent in an employee termination notice and related correspondence sent by Respondent to the Charging Party. The complaint alleges at paragraph 11 that the information requested by the Charging Party is necessary for, and relevant to, the Charging Party's performance of its duties as the exclusive bargaining representative of the Unit. The complaint further alleges that since about March 1, 2021, Respondent has failed and refused to furnish the Charging Party with this information and in so doing has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

Respondent timely filed its answer to the Complaint, denying the allegations, and raising numerous affirmative defenses. Among its affirmative defenses, Respondent asserts that the Complaint is time-barred under Section 10(b) of the Act and that the requested information is privileged and/or confidential. The case was tried before me via Zoom Government videoconference, on October 14, 2021. After carefully considering all of the testimony and evidence offered at the trial, as well as the arguments of the General Counsel and Respondent, I make the following findings of fact:

Respondent admits, and I find, that it is a corporation operating an acute care hospital providing inpatient and outpatient care in Kalamazoo, Michigan, where it annually derives gross revenue in excess of $2500,000 per year and purchases and receives goods valued in excess of $50,000 directly from points outside of the State of Michigan. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a healthcare institution within the meaning of Section 2(14) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent further admits, and I find, that Respondent represents the following appropriate unit of employees:

> All Registered Professional Nurses employed by the Medical Center and classified as full-time, regular part-time, and part-time employees (parttime employees are regularly scheduled to work sixteen (16) hours or more per week),

> excluding Directors, Assistant Directors, Supervisors, Clinical Nurse Specialist, Nurse Educators, Clinical Managers, Nurse Practitioners, Infection Control Specialist, Stomal Therapist, Employee Health Outcomes Specialist, members of the Order of the Sisters of St. Joseph, PRN Nurses, and other employees. Graduate nurses and nurses in the Nurse Residency Program shall be included in the bargaining unit.

Respondent admits that it has recognized the Union as the exclusive-collective bargaining representative of the Unit and that this recognition has been embodied in successive collective bargaining agreements, the most recent of which is effective from November 11, 2020, through November 11, 2022. This collective bargaining agreement is in the record as GC Exhibit 2.

At the time of the events at issue, Christen Crowley served in the position of Respondent's labor relations partner. Respondent admits, and I find that Crowley has been at all material times a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

Andrea Anantharam is employed by Respondent as a senior attorney in associate relations, which includes employee relations. She performs caregiver misconduct investigations. Julie Markgraf is employed by Respondent as a senior attorney in risk management and patient relations. Cheryl Sullivan is an employee of Ascension Risk Services as the Director of Risk Management. Teri Riddle is employed by Respondent as its Manager of Contract Staffing. As of November 20, 2020, she served as Respondent's Director of Emergency Services.

Jennifer Smith-Heck is employed by the Michigan Nurses Association as a labor relations representative. In this capacity, she negotiates contracts, enforces contracts, resolves workplace issues, and assists members with grievances. In late 2020, Respondent discharged employee and registered nurse Cory Shaw because of an incident on November 16, 2020, in which Shaw allegedly roughly handled a patient in the emergency department.

In November 2020, a complaint by a patient's daughter about Shaw was filed. Senior Attorney Julie Markgraf was notified of the complaint by Cheryl Sullivan, Respondent's Director of Risk Management. Markgraf then initiated an investigation. Sullivan sent an email to Markgraf indicating that, "Under the direction of legal counsel, we have initiated an investigation of an allegation of patient physical abuse . . ." (R. Exh. 5, p. 3.) Markgraf later responded to Sullivan stating, "please ask everyone involved in the investigation to label documents and other items created during the investigation as 'Confidential – prepared at the direction of legal counsel.'" Andrea Anantharam, another attorney and employee of Respondent, was later added to the investigation.

A copy of the Disciplinary Action Form regarding Shaw's termination is in the record as GC Exhibit 3. The Union filed a grievance on Shaw's behalf on December 9, 2020, alleging that Shaw's termination was unfair and unjustified. A copy of the grievance is in the record as GC Exhibit 4.

In Shaw's termination document, Respondent indicated that

> A patient's daughter lodged a complaint regarding the way that her father was treated while in the emergency department. The daughter states that the patient complained of 'being choked' as well as roughly handled during his visit to the Emergency Department. This prompted an investigation into the complaint. Witnesses had the opportunity to provide their perspective, the video footage was reviewed and Cory was able to provide his account of the event. Cory's actions were found not to be compliant with CPI techniques as well as the culture of the organization as outlined in the policies mentioned below.

(GC Exh. 3.) CPI is an abbreviation for Crisis Prevention Institute. CPI techniques are taught in de-escalation classes for emergency department staff and provide non-violent ways of dealing with patients. Anantharam testified that Shaw's non-compliance with CPI techniques was partly the reason for his discharge.

On January 6, 2021, Smith-Heck sent an email to Crowley attaching an information request. The information request sought numerous items, including access to video footage, copies of any and all policies relied upon by management in its decision to terminate Shaw, copies of all management investigation notes, witness statements, and other documentation made or collected during the investigation, names of all individuals interviewed or spoken to by management regarding the investigation, and copies of Shaw's personnel file. A copy of the email is in the record as GC Exhibit 5 and a copy of the attached information request is in the record as GC Exhibit 6.

On January 25, 2021, Crowley sent an email to Smith-Heck raising confidentiality concerns over the Union's information request. Crowley asked the Union to sign a confidentiality agreement, which was attached to the email. This email is in the record as GC Exhibit 7. Smith-Heck responded to Crowley with an email on January 25 asking which parts of the Union's information request were confidential. This email is in the record as GC Exhibit 8. Crowley replied that because the incident involved a patient, Respondent considered the video and witness statements to be confidential. Crowley's email is in the record as GC Exhibit 9. Smith-Heck agreed to sign the confidentiality agreement in an email in the record as GC Exhibit 10. The executed confidentiality agreement is in the record as GC Exhibit 11. Smith-Heck was then allowed to view the video of the incident with Crowley and to ask questions.

On January 26, 2021, Respondent provided some information in response to the Union's information request. A copy of Respondent's response is in the record as GC Exhibit 12. In its response, Respondent indicated that it provided the names of all individuals interviewed as part of the investigation, with the exception of Ron Gipson. According to Respondent, Gipson, "provided a professional interpretation of the CPI technique that was used in the video." (GC Exh. 12.) Gipson is employed by Respondent as the Director of Connective Services. He is not an attorney and does not provide medical services to patients. He provides training on CPI techniques at Respondent's facility. Gipson was not shown and did not sign his interpretation of the video footage. Gipson did not testify at the hearing.

Gipson apparently provided two such interpretations. Initially, Gipson watched the video footage of the incident involving Shaw with Cheryl Sullivan and Kelly Carlyle, an employee of Respondent in associate relations. Gipson gave his interpretation of what was shown on the video, including whether Shaw's actions complied with CPI techniques. Carlyle took notes of

this session. Carlyle did not testify at the hearing. This one-page document was reviewed by Anantharam and was never provided to the Union. Respondent further did not supply a summary of the document to the Union. Respondent did not offer to provide this document, in any form, to the Union. Gipson was not shown and did not sign these notes.

After seeing Carlyle's notes, Anantharam requested a second viewing of the video with Gipson. She watched video surveillance footage of the incident with Gipson, Carlyle, and Laura Majewski, Carlyle's supervisor. Crowley was invited to attend but was unable. While watching the footage, Gipson again provided a verbal assessment as to whether Shaw's actions were in compliance with CPI techniques. The determination that Shaw's actions did not comply with CPI techniques was made by Gipson. This second assessment was reduced to writing by Anantharam, who only showed them to Crowley. Anantharam testified that she intended for her notes to remain confidential. Gipson never saw or signed these notes.

On February 11, 2021, Smith-Heck sent another information request to Crowley in an email. The email is in the record as General Counsel's Exhibit 13. In this information request, Smith-Heck requested a copy of Gipson's interpretation and a copy of the CPI technique referenced in Respondent's earlier information request response, along with other information. At that time, Smith-Heck was not familiar with CPI techniques.

On March 1, 2021, Crowley responded to Smith-Heck's February 12 email with an email. Crowley's email is in the record as General Counsel's Exhibit 14. Crowley stated that Respondent objected to the request for Gipson's interpretation as protected by work product privilege, peer review privilege, internal deliberative process, and as prepared in anticipation of litigation. Specifically, Respondent indicated, "[t]he documents were prepared for review by legal counsel that evaluates potential legal exposure in anticipation of and preparation for potential litigation." In regard to the request for the CPI technique referenced in Shaw's termination document, Respondent indicated that it was unclear exactly what the Union was seeking. Crowley testified that she drafted this response with the assistance of legal counsel. She further testified that Respondent's attorneys are involved in all investigations of employee misconduct.

On April 1, 2021, Smith-Heck sent Crowley a follow-up email, which is in the record as General Counsel's Exhibit 15. Smith-Heck stated that the request for the specific CPI techniques was not vague. She stated, "we would like a copy of the specific CPI techniques that are referenced by the hospital in the Disciplinary Action Form . . . which were relied upon in the hospital's conclusion that Cory's actions were found not to be compliant with CPI techniques." Smith-Heck asked for information as to what exactly CPI is. Smith-Heck also requested a copy of the entire manual or book which contains the techniques that are referenced in Shaw's Disciplinary Action Form.

Respondent's attorney sent an email to Smith-Heck in reply stating that they would review her requests and get back to her. This email is in the record as General Counsel's Exhibit 16. On April 13, 2021, Respondent's attorney sent Smith-Heck another email indicating that he was working to compile and review potentially responsive information. The attorney promised to get back to Smith-Heck as soon as he could. The April 13 email is in the record as General Counsel's Exhibit 17.

On April 22, 2021, Respondent's attorney sent an email in response to Smith-Heck's April 1 information request. Theis email is in the record as General Counsel's Exhibit 18. No mention was made of Gipson's interpretation of the video footage. The attorney indicated that the information on CPI was already available to the Union, as many members have access to the CPI materials through its website. The attorney provided a website link to the CPI materials and attached the documents. The CPI Instructor's Guide is in the record as General Counsel's Exhibit 19. The CPI course is in the record as General Counsel's Exhibit 20. General Counsel's Exhibits 19 and 20 are over 300 pages long. The CPI course contains non-violent techniques for handling patient crises. After reviewing the CPI documents, Smith-Heck could not determine what Respondent found objectionable about Shaw's behavior. Shaw's grievance is still active and pending arbitration.

Respondent's Exhibit 3 is a copy of the emails contained in General Counsel's Exhibits 5, 7, 8, 9, 10, 13, and 14, but it also includes a redacted copy of the handwritten complaint regarding the incident that led to Shaw's discharge. Respondent's Exhibit 4 contains the emails contained in General Counsel's Exhibits 15, 16, 17, and 18, and also the attachments in the record as General Counsel's Exhibits 19 and 20.

Respondent also provided an email exchange between Anantharam and Steve Carlson, an agent of the NLRB, which is in the record as Respondent's Exhibit 6. In the exchange, Carlson said he was puzzled by Respondent's apparent confusion over what the Union was seeking. Carlson went on to reference Shaw's Disciplinary Action Form in which Respondent indicated that Shaw's actions were not in compliance with CPI techniques and the January 26, 2021, email in which Respondent stated that Ron Gipson provided a professional interpretation of the CPI technique that was used in the video.

In response, Anantharam stated that, "it was not that Shaw violated a particular CPI technique or failed to comply with a specific technique. The issue is that Mr. Shaw did not employ a CPI technique at all." Anantharam went on to assert that Gipson's interpretations of the video footage were privileged. She further argued that Gipson did not make the decision to terminate Shaw and was not involved in that decision. Instead, she said, Gipson's interpretations were prepared for review by legal counsel and in preparation for potential litigation. Anantharam also asserted that the interpretations were shielded from disclosure by peer review privilege under Michigan law.

When asked the relevance of the information request for the CPI techniques, Smith-Heck testified that they were referenced by Respondent in Shaw's termination document and that the Union was not familiar with them at the time. As to both requests, Smith-Heck testified that both requested pieces of information would assist the Union in processing Shaw's grievance and would help the Union determine whether the grievance is meritorious. She indicated that the Union would not proceed to arbitration if these documents indicated that Shaw's grievance was not meritorious. She further indicated that the Union needs all information on Shaw's termination.

Crowley also testified that Shaw's actions did not violate any specific CPI technique. However, in Shaw's discharge paperwork, Respondent indicated that Shaw's actions were found,

"not to be compliant with CPI techniques." Smith-Heck was never told that Shaw's actions did not fit within any particular CPI technique or that Shaw failed to use any CPI technique.

Riddle testified that she made the decision to terminate Shaw and that Shaw's non-compliance with CPI techniques was not a factor in her decision. This testimony was contradicted directly by that of Anantharam, who testified that Shaw was discharged, in part, because of his failure to comply with CPI techniques. Riddle said that she was never made aware of Gipson's interpretations of the video footage of the Shaw incident. She was not present on either occasion when Gipson gave his interpretations of the video footage. Despite this testimony, the Disciplinary Action Form given to Shaw states that his actions were found not to be compliant with CPI techniques and Riddle both reviewed and signed this document. However, she stated that Respondent's human resources department added the language about the CPI techniques. Anantharam testified that she made recommendations to local leaders on Shaw's employment, but Riddle did not mention this.

Respondent did not offer to provide Gipson's interpretations in an amended or redacted form. Respondent did not offer to allow Smith-Heck to view Gipson's interpretations without receiving a copy. Smith-Heck never spoke to Gipson about his interpretations. She did not know for sure if his interpretations were taken into account when Respondent decided to discharge Shaw.

All witnesses agreed that Respondent has not provided any information to the Union regarding the specific CPI technique or techniques that Shaw failed to comply with and has not provided the Union with Gipson's interpretations of Shaw's actions under the CPI techniques.

Respondent's witnesses testified that all incidents of employee misconduct are investigated, regardless of whether there is a risk of litigation. Respondent uses what is termed its "caregiver misconduct flow" when there is an allegation of patient abuse. Following an allegation of abuse, it is standard practice to engage legal counsel for what Sullivan said was anticipation of litigation so that Respondent gets privilege protection for its work product. All witnesses believed that Respondent's protocols for investigating complaints of employee misconduct were followed in this case. Anantharam generally supervises and directs investigations of patient abuse.

These are the facts as I have found them. Now I shall turn to the discussion and analysis portion of this decision. Most of the facts in this case are not in dispute, as they are embodied in a series of emails and attachments that are in the record. This case really comes down to a legal dispute over whether Respondent's refusal to provide the requested information violates the National Labor Relations Act.

Some of my credibility resolutions have been made as part of the findings of fact herein. To the extent any witness' testimony is contradicted by documentary evidence, I credit the evidence over the testimony. Furthermore, to the extent Riddle and Anantharam contradicted each other, I did not credit the testimony. For example, Anantharam testified that Shaw was discharged at least in part because his actions did not comply with CPI techniques. Riddle, however, testified that Shaw's failure to employ or comply with CPI techniques was not a part of the reason he was discharged. In addition, Riddle failed to mention that Anantharam made recommendations regarding Shaw's employment. Riddle also testified that it was her decision alone to discharge Shaw. She later admitted under cross-examination that Respondent's human resources

department inserted certain language into Shaw's Disciplinary Action Form. For these reasons, I do not credit the testimony of Anantharam or Riddle, unless it is supported by other, more reliable evidence, it is inherently probable, or it acts as an admission against Respondent's interest.

I found Smith-Heck to be a credible witness. She testified in a straightforward and frank manner. Her testimony did not waver on cross examination and was supported by the documentary evidence in the case. Respondent's cross-examination of her merely elucidated that she did not ever speak to Gipson directly and that she could not be sure if Gipson's interpretations were taken into account in Respondent's decision to terminate Shaw's employment.

I found Crowley to be a generally credible witness. She seemed forthright while testifying. However, to the extent her testimony seeks to downplay the fact that Shaw's noncompliance with CPI techniques factored into his discharge, I do not accept it, as it is contradicted by Respondent's own Disciplinary Action Form.

I also found Markgraf to be a generally credible witness. She gave her brief testimony in a direct and steady manner. However, I do not accept her testimony that advising Sullivan to mark all documents confidential created protection for those documents under the work product doctrine.

I found Cheryl Sullivan to be a credible witness. Her brief testimony was given in a sure and direct fashion. Her testimony was supported by the documentary evidence in the case and did not waver on cross-examination. For these reasons, I have credited her testimony.

Generally, an employer is obligated to provide a union with requested information that is "potentially relevant and would be of use to the union in fulfilling its responsibilities as the employees' bargaining representative." *FCA US LLC,* 371 NLRB No. 32, slip op. at 3 (2021), citing *E.I. Du Pont de Nemours & Co.,* 366 NLRB No. 178, slip op. at 4 (2019) (citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967) and *Postal Service*, 332 NLRB 635, 635 (2000)). In evaluating relevance, the Board uses a "liberal, discovery-type standard" that requires only that the requested information have "some bearing upon" the issue between the parties and be "of probable use to the labor organization in carrying out its statutory responsibilities." *E.I. Du Pont,* 366 NLRB No. 178, slip op. at 4 (quoting *Public Service Co. of New Mexico*, 360 NLRB 573, 574 (2014), and *Postal Service*, 332 NLRB at 636). Information pertaining to bargaining unit employees is presumptively relevant. Id. But where the information requested is not presumptively relevant, "it is the union's burden to demonstrate relevance." Id. The union's burden to demonstrate relevance is not heavy, but it does require "demonstrating a reasonable belief supported by objective evidence that the requested information is relevant, unless the relevance of the information should have been apparent to the Respondent under the circumstances." Id.; see also *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Postal Service*, 310 NLRB 391, 391 (1993) (requiring "a logical foundation and a factual basis" for extra-unit information requests). Finally, the Board "does not pass on the merits of the underlying grievance or determine beforehand whether a breach of the collective bargaining agreement occurred." *Teachers College, Columbia University*, 365 NLRB No. 86, slip op. at 4 (2017).

Information that does not directly concern terms and conditions of employment of unit employees is not presumptively relevant, even when sought for the purpose of processing grievances. *FCA US LLC,* 371 NLRB No. 32, slip op. at 3. Therefore, I do not find that the information sought by the Union in this case was presumptively relevant. The question then becomes whether the Union carried its burden of demonstrating to Respondent a reasonable belief supported by objective evidence that the information was relevant. Id. This burden is not heavy, and I find that the Union has met it.

Respondent, in its Disciplinary Action Form terminating Shaw's employment, stated that his actions were found not to be compliant with CPI techniques. In a response to the Union's initial information request, Respondent stated that Ron Gipson provided professional interpretation of the CPI techniques used in the video. Therefore, on February 11, 2021, the Union requested a copy of Gipson's interpretation and a copy of the CPI technique that was referenced. Later, the Union clarified that Respondent's reference to the CPI techniques in Shaw's Disciplinary Action Form speaks for itself in establishing relevance. Thus, in evaluating the merits of Shaw's grievance and in processing his grievance, the Union required a copy of a document referenced by Respondent itself in the document terminating Shaw's employment. I find that the Union met its burden to establish the relevance of its request for the specific CPI techniques referenced in Shaw's Disciplinary Action Form.

Respondent later and at the hearing seemed to try to disavow or downplay the statement in Shaw's Disciplinary Action Form that his actions were noncompliant with CPI techniques. Despite these efforts, the Disciplinary Action Form says what it says. It was issued to Shaw when he was discharged. Respondent did not provide information responsive to the Union's request for a copy of the specific CPI techniques that Shaw failed to comply with, instead providing the entire CPI course and instructor guide and a link to those documents on its website. Referring a union to the entire text of a document instead of referring it to a specific section of the document has been found not to be a good faith response to an information request and has been found to violate the Act. *Postal Service,* 332 NLRB 635, 638 (2000). Similarly, in this case, Respondent should have provided a copy of or directed the Union to the specific section of the CPI techniques with which it found Shaw failed to comply. Its failure to do so violated Section 8(a)(5) and (1) of the Act.

Moreover, Respondent advised a Board agent during the investigation of this matter that it did not have any documents responsive to the Union's request for specific CPI techniques. However, Respondent never told the Union that it did not have any responsive documents. Respondent had a duty to either provide this relevant information or explain that no such information existed. A delay in advising a Union that information it requested does not exist violates the Act. *Graymont PA, Inc*., 364 NLRB No. 37, slip op. at 10 (2016). See also *Endo Painting Service, Inc*., 360 NLRB 485, 486 (2014) (duty to bargain includes the duty "to timely disclose that requested information does not exist."). Similarly, an outright failure to inform a union that the information it requested does not exist violates the Act. Therefore, I find Respondent's failure to advise the Union that there were no specific CPI techniques with which Shaw had failed to comply violated Section 8(a)(5) and (1) of the Act.

I also find that the Union established the relevance of Gipson's interpretations of the video footage of the Shaw incident. On January 6, 2021, the Union requested copies of all

management investigation notes, witness statements, and other documentation collected during the investigation, as well as names of any individuals interviewed or spoken to by management regarding the investigation. In replying to the Union's information request for the names of all individuals interviewed or spoken to by management regarding the Shaw investigation, Respondent stated that management spoke to Ron Gipson, who provided a professional interpretation of the CPI techniques that were used in the video. Respondent also indicated in the response that it believed that this information was privileged. The Union then requested a copy of Gipson's interpretations. Respondent again replied that it believed that this information was protected by the work product privilege, as it was prepared in anticipation of litigation, and by Michigan's peer review privilege. Later, at a Step 3 meeting over Shaw's grievance, the Union again raised that it was waiting for Gipson's interpretations.

Respondent, in Shaw's Disciplinary Action Form, stated that his actions were not compliant with CPI techniques. Respondent later stated that it received an interpretation of the CPI techniques in the video from Gipson. It is apparent that Gipson's interpretations might have formed the basis for the conclusion that Shaw's actions were not compliant with CPI techniques. This was not a boilerplate request for wide ranging information. Instead, the Union was requesting specific documents referenced by Respondent with direct bearing on Shaw's discharge. As such, I find that the Union met its burden of establishing the relevance of Gipson's interpretations of the video footage of the Shaw incident.

In *Piedmont Gardens*, the Board held that when an employer asserts a confidentiality interest in protecting witness statements from disclosure, the appropriate standard is the *Detroit Edison* balancing test applicable to confidential information generally. 362 NLRB at 1135, citing *Detroit Edison v. NLRB*, 440 U.S. 301, 315–320 (1979). Under that standard, the Board balances a union's need for requested relevant information against an employer's established "legitimate and substantial" confidentiality interests. Id. But "[e]stablishing a legitimate and substantial confidentiality interest requires more than a generalized desire to protect the integrity of employment investigations." Id. at 1137. Rather, an employer must "determine whether in any give[n] investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, [or] there is a need to prevent a cover up." Id. (quoting *Hyundai America Shipping Agency*, 357 NLRB 860, 873–874 (2011), enfd. in relevant part 805 F.3d 309 (D.C. Cir. 2015)). Assuming that an employer establishes a legitimate and substantial confidentiality interest that outweighs a requesting union's need for the information, the employer "may not simply refuse to provide the information but must seek an accommodation that would allow the requester to obtain the information it needs while protecting the party's interest in confidentiality." Id. (citing *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004)). An employer is obligated only to offer an accommodation and if the union is dissatisfied with the offer, it is then required to respond and explain why the proffered accommodation is insufficient. Id. at 1137 fn. 7 (citation omitted).

The employer must offer an accommodation that that will meet the needs of both parties, *National Steel Corp*., 335 NLRB 747, 748 (2001), enfd. 324 F.3d 928 (7th Cir. 2003), which may include an offer to release information conditionally, *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 20 (D.C. Cir. 1998), enfg. 324 NLRB 854 (1997). *FCA US LLC,* 372 NLRB No. 32, slip op. at 4 (2021). The employer may also offer to supply the information on an alternative timeline. Id. at 5.

In a previous proceeding between these parties, the Board found that Michigan state law protects from disclosure health care facilities' self-review documentation, including incident reports. See *Borgess Medical Center,* 342 NLRB 1105, 1105 (2019). However, the Board also found that, despite Respondent's confidentiality interest under Michigan state law, Respondent violated the Act by failing to offer a reasonable accommodation to the union. Id. at 1106. Similarly, in the instant case, Respondent has raised a confidentiality claim under Michigan law. The Union has also established a need for the information. The Union requires the information to weigh the merits of Shaw's grievance. However, there is no evidence that Respondent offered the Union any accommodation at all. In so doing, Respondent violated Section 8(a)(5) and (1) of the Act.

However, Respondent here does not merely raise a state law confidentiality interest. Instead, Respondent asserts that Gipson's interpretations are protected from disclosure by the work product doctrine. The work product doctrine or privilege, which was first recognized by the Supreme Court over 50 years ago in *Hickman v. Taylor*, 329 U.S. 495 (1947), and later codified in Federal Rule of Civil Procedure 26(b)(3), protects from disclosure written material prepared by a party or his representative in anticipation of litigation or for trial. *Sprint Communications,* 343 NLRB 987, 988 (2004). The strong public policy underlying the work product doctrine is to aid the adversarial process by providing a certain degree of privacy to a lawyer in preparing for litigation. Id.

The work product privilege, however, is not absolute. Id. Rule 26(b)(3) provides that a party may obtain otherwise protected documents upon a showing that he has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Id. citing Fed. R. Civ. P. 26(b)(3). Even if such a showing is made, courts will protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Id.

In *Sprint Communications*, the Board found that work product protection will be accorded where a document was created because of anticipated litigation and would not have been created in substantially similar form but for the prospect of that litigation. 343 NLRB at 988. In order to meet this standard, the party representative must have had at least a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable. 343 NLRB at 988-989. The prospect of litigation need not be actual or imminent, but it must be fairly foreseeable. 343 NLRB at 989 citing *Coastal States Gas. Corp. v. Dept. of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980).

Respondent's witnesses all testified that it investigates all allegations of employee misconduct and patient abuse, regardless of the risk of litigation. Furthermore, Respondent follows established protocols and procedures in conducting its investigations. Thus, I find that the investigation into Shaw's alleged misconduct was a routine investigation conducted in the ordinary course of Respondent's business. Moreover, I do not find that work product protection attached to Gipson's interpretations merely because Markgraf advised Sullivan to ask everyone involved in the investigation to label documents and other items created during the investigation as 'Confidential – prepared at the direction of legal counsel.' Instead, I find that this is a conclusory statement of limited evidentiary value. It does not overcome the evidence that this

was a routine investigation, conducted in a similar manner to all other investigations of employee misconduct. Markgraf, an employee of Respondent and an attorney, testified that the records of the investigation were kept in the ordinary course of Respondent's business. Thus, I do not find that Gipson's interpretations as recorded by Carlyle, are protected from disclosure by the work product doctrine.

The notes of Gipson's first interpretation of the video footage were prepared by Carlyle, who is not an attorney. They do not contain the impressions of anyone other than Gipson, who also is not an attorney. Although Anantharam is an attorney, I have found that the document she created containing Gipson's impressions were not created in anticipation of litigation. Instead, they were created in the ordinary course or Respondent's business as part of a routine investigation. Respondent routinely involves attorneys in its investigations. Therefore, I do not find that Anantharam's notes of Gipson's interpretations are protected by the work product doctrine. To the extent either Carlyle's or Anantharam's notes contain information or impressions beyond Gipson's interpretations, such information may be redacted.

In its answer to the complaint, Respondent raised 8 affirmative defenses. Respondent's affirmative defenses include an alleged failure to state a valid claim under the Act, mootness, privilege and/or confidentiality, timeliness, that it has not violated the Act, and that the remedies sought are improper. I have already discussed Respondent's privilege and confidentiality defense. At the hearing and in its oral argument, Respondent did not mention any of its affirmative defenses, aside from privilege and confidentiality. The proponent of an affirmative defense has the burden of establishing it. *Babcock & Wilcox Construction Co*., 361 NLRB 1127, 1140 (2014), citing *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004) (finding the burden on the party raising an untimely charge defense under Sec. 10(b) of the Act), enfd. 483 F.3d 628 (9th Cir. 2007). As Respondent presented no evidence supporting its remaining affirmative defenses at the trial, and did not discuss them in its oral argument, I will not address them further.

In summary, I find that the General Counsel has established, by a preponderance of the credible evidence, that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with the specific CPI techniques it asserted were violated by Shaw and Ron Gipson's interpretations of those techniques referenced by Respondent in an employee termination notice and correspondence.

Therefore, I make the following conclusions of law: (1) Respondent, Ascension Borgess Hospital, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and a healthcare institution within the meaning of Section 2(14) of the Act; (2) the Union is a labor organization under Section 2(5) of the Act; (3) by failing and refusing to provide the Union with information requested on February 11, 2021, that is relevant and necessary to the performance of its function as the exclusive collective-bargaining representative of Respondent's employees, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act; and (4) the unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and 2(7) of the Act.

When the transcript of this proceeding has been prepared, I will issue a certification which attaches as an appendix the portion of the transcript reporting this bench decision. The certification will contain a statement of the case, conclusions of law, remedies, a recommended order, and will attach both this decision in its entirety and a notice to employees. When the certification is served upon the parties, the time period for filing exceptions will begin to run. I direct your attention to the Board's Rules and Regulations regarding the time period for filing exceptions. I want to thank counsel for the General Counsel and counsel for Respondent for your professionalism and competence in presenting this case. With that, the trial is now closed, and we are off the record.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT, upon request, fail and refuse to bargain collectively and in good faith Michigan Nurses Association, (Union) as the designated servicing representative of the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit:

All Registered Professional Nurses employed by the Medical Center and classified as full-time, regular part-time, and part-time employees (part-time employees are regularly scheduled to work sixteen (16) hours or more per week) excluding Directors, Assistant Directors, Supervisors, Clinical Nurse Specialist, Nurse Educators, Clinical Managers, Nurse Practitioners, Infection Control Specialist, Stomal Therapist, Employee Health Outcomes Specialist, member of the Order of the Sisters of St. Joseph, PRN Nurses, and other employees. Graduate nurses and nurses in the Nurse Residency Program shall be included in the bargaining unit.

by failing and refusing to provide, the Union with requested information that is relevant and necessary to its role as the designated servicing representative of the exclusive collective-bargaining representative of unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Section 7 of the Act.

WE WILL furnish the Union with the following information it requested on February 11, 2021: the CPI techniques and Ron Gipson's interpretation of those techniques referenced by Respondent in an employee termination notice and related correspondence sent by Respondent to the Charging Party. If any of this information does not exist, Respondent shall inform the Union that no such documents exist. If the documents containing the interpretations of Ron Gipson contain information or impressions beyond Gipson's interpretations, such information may be redacted.

ASCENSION BORGESS HOSPITAL
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Room 05-200, Detroit, MI 48226-2569
(313) 226–3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-273489 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226–3244.